Message

From: Alasti, Isabella@DTSC [Isabella.Alasti@dtsc.ca.gov]
Sent: 10/11/2017 6:46:53 PM
To: Bradfish, Larry [Bradfish.Larry@epa.gov]
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

Uh oh. I'm not sure what I owe – I count on the PM to keep me in line. I'll ask Jim, but I'm open to hearing from you too.....

From: Bradfish, Larry [mailto:Bradfish.Larry@epa.gov]
Sent: Wednesday, October 11, 2017 9:32 AM
To: Alasti, Isabella@DTSC <Isabella.Alasti@dtsc.ca.gov>
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

For now, only Aerojet's deed restriction proposal is on the table for the carve out lands. I don't remember off-hand where we last left this. I think you sent me the materials that Aerojet sent to just the state concerning deed restrictions. Were you supposed to get back to Aerojet on their deed restriction proposal?

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From: Alasti, Isabella@DTSC [mailto:Isabella.Alasti@dtsc.ca.gov]
Sent: Wednesday, October 11, 2017 9:21 AM
To: Bradfish, Larry <Bradfish.Larry@epa.gov>
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

Hi Larry,

That makes more sense. If just the carve out is part of the modified PCD because of the parties not being at final remedy and just to be protective, but C29/41 are finalized per tech memo, I have no problem justifying land use covenants with EPA as 3rd party. I think it's defensible to have a covenant on the carve out because of the understanding of the plume. And the rationale that when the remedy is finalized the LUC will be amended or removed accordingly. Almost like a federal facility early transfer. I'll let program know to look for the tech memo. And will you be modifying the PCD?

And thanks for the update on Area 40.

Isabella

From: Bradfish, Larry [mailto:Bradfish.Larry@epa.gov]
Sent: Wednesday, October 11, 2017 8:54 AM
To: Alasti, Isabella@DTSC <Isabella.Alasti@dtsc.ca.gov>
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

Hi Isabella,

I think the tech memo to file would work for C29/C41 as those sites are part of Operable Unit 5. The carve out lands and the groundwater beneath them are not part of a current OU. The groundwater will probably be part of the final groundwater remedy (maybe OU1), but that will be years from now. The PCD was modified in 2001 to set aside the carveout lands and to provide draft covenants for those lands. My thought is to modify the PCD again to add or amend the existing covenants to include vapor mitigation for those parts of the carveout lands where vapor intrusion is an issue. Aerojet is proposing deed restrictions for the carveout lands, but my concern is that they rely on enforcement by both the state and EPA as third party beneficiaries. This may be OK in theory, but if someone challenges it in the future and succeeds, we may not be able to enforce them.

I think we will need a MOU/MOA between EPA and the state for the state to carry out the remedial work on Area 40. I am getting some mixed signals from my program people about how this all is going to go down.

Larry

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From: Alasti, Isabella@DTSC [mailto:Isabella.Alasti@dtsc.ca.gov]
Sent: Wednesday, October 11, 2017 8:36 AM
To: Bradfish, Larry <Bradfish.Larry@epa.gov>
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

Hi Larry,

Seems like modifying the PCD would be a lot more work than just having EPA write a memo-to-file (tech memo) explaining that C29/C41 and the groundwater under the carve-out is part of the ROD 5 (was that it?) and that the VI issues in the ROD extend to those portions. In my opinion, that would be the fastest and most CERCLA-NCP-appropriate way to resolve this issue. And it would be clear in the Admin. Record. Changing the PCD doesn't seem as accurate path since the PCD would just be something the parties agree to and would not be a CERCLA decision. I'm just still really confused why we wouldn't want this as part of a decision document – but maybe I'm still missing something?

Separately, for Area 40, is EPA looking at an MOU with DTSC where DTSC would conduct the remediation through its state laws?

I'm in and available most of the rest of this week if it would be easier to talk. Thanks,

Isabella

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From: Bradfish, Larry [mailto:Bradfish.Larry@epa.gov]
Sent: Tuesday, October 03, 2017 3:43 PM
To: Alasti, Isabella@DTSC <Isabella.Alasti@dtsc.ca.gov>
Subject: RE: Aerojet Phase 1 Glenborough VM Restrictions

Hi Isabella,

Thank you for sending along the proposed deed restrictions by Aerojet to address VI issues on carveout lands and C29/C41. I was in a meeting today with my RPMs for Aerojet. They are concerned about the enforceability of ICs for the Carveout Lands. I told them about the deed restrictions proposed by Aerojet and that enforcement would be through the state and EPA as 3rd party beneficiaries. They were not enthused. Prior to this proposal, we discussed other means of dealing with VI issues on carveout lands. My suggestion was to amend the PCD to include covenants that address VI through vapor mitigation. Previously, the PCD had been amended (2001/2002) to include covenants that addressed groundwater use on carveout lands. There were also covenants addressing vapor intrusion on one or more parcels where VI was an issue from soil contamination. So, it wouldn't be unprecedented for the PCD to be modified to require vapor mitigation covenants that address the VI issue related to groundwater. I suspect that Aerojet would not like this option but it would give the state more teeth to enforce these covenants as opposed to deed restrictions with untested 3rd party beneficiary enforcement provisions.

Larry

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From: Alasti, Isabella@DTSC [mailto:Isabella.Alasti@dtsc.ca.gov]
Sent: Monday, September 11, 2017 12:23 PM
To: Bradfish, Larry <Bradfish.Larry@epa.gov>
Subject: FW: Aerojet Phase 1 Glenborough VM Restrictions

Hi Larry,

I'm just forwarding this to you fyi. And just as a note, I find it odd that EPA isn't also on these calls we have. I'll mention it today too, but do you know why? Thanks,

Isabella

From: Hobel, Lawrence [mailto:Lhobel@cov.com]
Sent: Monday, September 11, 2017 11:36 AM
To: Fennessy, Christopher <christopher.fennessy@Rocket.com>; Alasti, Isabella@DTSC <Isabella.Alasti@dtsc.ca.gov>; Hvidsten, William <william.hvidsten@Rocket.com>; David.Lancaster@Waterboards.ca.gov; MacDonald,

Alex@Waterboards <Alex.MacDonald@waterboards.ca.gov>; Rohrer, Jim@DTSC <Jim.Rohrer@dtsc.ca.gov>; Russell Austin <RAustin@murphyaustin.com>; Feng, Wendy <wfeng@cov.com>
Subject: FW: Aerojet Phase 1 Glenborough VM Restrictions

Dear All:

Aerojet Rocketdyne (AR) is providing in this email and its attachments our approach to implementing vapor mitigation (VM) at Glenborough Phase 1. This has been the product of collaboration among real estate and environmental lawyers and professionals. We will be walking through this email and its attachments on a call with State representatives on September 11 and look forward to additional discussions. We understand that, as with earlier LUC provisions, EPA is deferring to the State on the form of the language. Russell Austin, AR's real estate lawyer, will be joining us on the call.

There are two categories of properties. *As to both categories, AR will be requiring VM and we explain how we propose to do so in this letter.*

Category 1 Property:

- Properties within Phase 1A of Glenborough where recent sampling supports an Agency requirement to implement VM.
- This category includes C29/C41.
- This category also includes "Carve Out Property" (as described below)
- Proposed Category 1 Property is illustrated in the map included in Tab 1.

Category 2 Property

- Properties within Phase 1A of Glenborough and Phase 1 B where recent sampling confirms that there should not be an Agency requirement to implement VM.
- The Category 2 Property is wholly "Carve Out Property" (as described below)
- Proposed Category 2 Property is illustrated in the map included in Tab 2.

Background of Prior Conveyances and Current Ownership of Category 1 Property and Category 2 Property:

On November 24, 2009 and following the 2002 Court approval of Carve Out and recordation of the 2002 Declarations of Covenants and Environmental Restrictions (2002 Carve Out CCRs), AR transferred to its affiliate Easton Development Company (EDC), certain real property subject to the 2002 Carve Out CCRs (Carve Out Property) including (but not limited to) the following: (i) that portion of the Category 1 Property but excluding C29/C41 (Carve Out Category 1 Property), and (ii) all of the Category 2 Property. Such transfer was pursuant to a Grant Deed, a copy of which is at Tab 3 (2009 Grant Deed), and subject to certain terms, conditions, notices, rights, powers, obligations, exceptions, reservations, restrictions, covenants and other matters set forth in such 2009 Grant Deed pertaining to the environmental condition of the Carve Out Property (Deed Environmental CCRs).

On November 29, 2012 and following the issuance by the U.S. Environmental Protection Agency of two Unilateral Administration Orders (UAOs) pertaining to that portion of the Aerojet Superfund Site designated as Operable Unit 5 (OU-5) and affecting certain portions of the Carve Out Property described in the 2009 Grant Deed (or the groundwater underlying such Carve Out Property) within the boundary of OU-5 and subject to such UAOs, AR and EDC amended the Deed Environmental CCRs to incorporate certain additional notices, restrictions and covenants pertaining to the OU-5 UAOs, pursuant to a First Amendment to Environmental Restrictions, Covenants and Conditions, a copy of which is at Tab 4.

On May 29, 2015 and in connection with the sale by EDC to a third party buyer of that portion of the Carve Out Property transferred to EDC pursuant to the 2009 Grant Deed commonly known as Assessor Parcel Number 072-0231-140-0000 (Sale Property), AR and EDC amended the Deed Environmental CCRs solely with respect to the Sale Property pursuant to a Second Amendment to Environmental Restrictions, Covenants and Conditions, a copy of which is at Tab 5. None of the Category 1 Property or the Category 2 Property is encumbered or affected by such Second Amendment.

Since C29/C41 was not part of Carve Out Property, those areas were not transferred from AR to EDC by the 2009 Grant Deed and are therefore not subject to the Deed Environmental CCRs. C29/C41 are subject to the recorded 2016 Covenants to Restrict Use of Property (2016 C29/C41 LUCs).

AR is still the fee owner of C29/C41, subject to the 2016 C29/C41 LUCs. EDC is still the fee owner of the Carve Out Category 1 Property and the Carve Out Category 2 Property, subject to the Deed Environmental CCRs.

Proposed VM for Category 1 Property: (where Agencies would require VM if AR were not already committed to requiring it)

From a practical and commercial perspective, it is important for all Category 1 Property to have the same VM requirements in the same format within the same development area. AR strongly believes that attempting to add language in one type of document (e.g., the 2016 C29/C41 LUCs) while adding language in another type of document (the 2002 Carve Out CCRs), will likely lead to developer and property owners' association (POA) confusion. We have therefore developed an alternative approach that meets the same VM need but accomplishes it in a manner that is the same for all Category 1 Property within the development area requiring VM.

To implement VM for the Carve Out Category 1 Property owned by EDC, AR proposes that the Deed Environmental CCRs (as amended by the First Amendment thereto) be further amended solely as to the Carve Out Category 1 Property (the Category 1 VM Amendment) to establish the obligation to implement VM, which Category 1 VM Amendment can be found at Tab 6. As can be seen from the Category 1 VM Amendment:

- it requires that VM be implemented by the Owner;
- the Agencies are third party beneficiaries;
- third party beneficiaries are, under California law, specifically entitled to enforce, and to avoid any suggestion otherwise, the Amendment specifically provides for the right of the Agencies to enforce and to recover costs; and
- the VM provisions cannot be modified without Regulatory Agency approval.

For C29/C41, the structure is the same, but it is implemented by a new Grant Deed transferring C29/C41 from AR to EDC (because, as noted above, the transfer to EDC has not yet occurred). A copy of this C29/C41 Grant Deed can be found at Tab 7.

There is one important difference between the VM requirement drafted for the Former Company Store (FCS) and for the Category 1 Property. The VM provision for FCS requires that the VM design be pre-approved by DTSC, whereas neither the Category 1 VM Amendment nor the C29/C41 Grant Deed contains such a requirement. Rather, the Category 1 VM Amendment and the C29/C41 Grant Deed simply give the Regulatory Agencies the right to enforce the requirement for VM. The VM requirement thus reads:

> No Owner or Occupant shall construct any building on any portion of the Real Property without Vapor Mitigation designed by a licensed engineer in accordance with applicable regulatory agency guidance and standards. Such Vapor Mitigation shall be maintained by the Owner and shall, at a minimum require (i) poured concrete slabs constructed in compliance with applicable building codes for all buildings (unless a different type of foundation providing equivalent protection is expressly required or permitted by then current regulatory agency guidance and standards); (ii) a vapor barrier to affect Vapor Mitigation; (iii) a passive sub-slab depressurization system that can be converted to an active system if necessary, and (iv) verification by a licensed engineer upon completion of construction that the Vapor Mitigation is constructed properly and functioning.
>
> > No activities shall be conducted at the Real Property that interfere with the integrity or effectiveness of Vapor Mitigation, including any associated vapor monitoring wells.
> >
> > For purposes of this Section [F.5], the term "building" does not include roofed structures without walls or structures that are not for human habitation and this Section [F.5] shall not apply to the construction of such structures.

We have eliminated the requirement for pre-approval, because it is both unnecessary and unrealistic. Assuming that the Category 1 Property is limited to the property south of the new roadway (Easton Valley Parkway), there would still be over 80 dwelling units. Should the Category 1 Property extend north of that roadway, there would be even more dwelling units with the number dependent upon where the line is drawn. (There are over 133 dwelling units in Phase 1 A north of that roadway.) Imposing a pre-approval authority is not necessary and it is not realistic for DTSC to be held accountable for pre-approval on a timely basis.

The Agency enforcement provisions and cost reimbursement provision in both the Category 1 VM Amendment and the C29/C41 Grant Deed reads as follows:

> The covenants, conditions, restrictions, prohibitions and terms and conditions set forth in this Section [F.5] shall be for the benefit of, and shall be enforceable by, the Regulatory Agencies as third-party beneficiaries pursuant to general contract law including, but not limited to, Civil Code section 1559 and the Owner shall reimburse a Regulatory Agency for its reasonable and necessary costs incurred in exercising such rights, promptly following receipt of a written demand therefor from such Regulatory Agency.
>
> This Section [F.5] may not be modified, amended or deleted without the prior written consent of the Regulatory Agencies, and the Owner shall reimburse any Regulatory Agency for its reasonable and necessary costs incurred in connection with providing such consent, promptly following receipt of a written demand therefor from such Regulatory Agency.

Please note that neither the Category 1 VM Amendment or the C29/C41 Grant Deed contain language relative to the POA's obligations, as such POA obligations would be set forth in the Master CCRs for Glenborough. We are developing language to be included in the Master CCRs regarding such POA obligations and will provide such language to the Agencies at a later date.

Proposed VM for Category 2 Property: (where AR is requiring VM even though the Agencies have not required it in the absence of AR's requirement)

As noted above, Category 2 Property is Carve Out Property where the Agencies have not sought to require VM. It includes all Phase 1B property and those portions of Phase 1A that the Agencies concur do not require VM. AR intends to implement VM through the same structure as for Carve Out Category 1 Property; namely, through a further amendment to the Deed Environmental CCRs (as amended by the First Amendment thereto) applicable solely as to the Category 2 Property (Category 2 VM Amendment), which we provide as Tab 8.

The VM obligation for the Category 2 Property remains substantively the same as the Category 1 Property. The only difference is that the Category 2 VM Amendment does not include any direct enforcement rights for the Agencies, but the VM provisions may not be modified, amended or terminated without Agency approval.

> This Section [F.5] may not be modified, amended or deleted without the prior written consent of the Regulatory Agencies, and the Owner shall reimburse any Regulatory Agency for its reasonable and necessary costs incurred in connection with providing such consent, promptly following receipt of a written demand therefor from such Regulatory Agency.

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We look forward to discussing this letter and its attachments with the Agencies.

Best,
Larry

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